IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.669 OF 2006
WITH
CIVIL APPLICATION NO.902 OF 2006

Indermal Delchand Jain & Ors. ..Appellants.

V/s.

Brihanmumbai Municipal Corpn.
of Gr.Mumbai & Ors. ..Respondents.

Mr.Asif Ali Siddiquie for appellants.

Mrs. Geeta Joglekar for BMC.

Mr.Anil D. Yadav for respondent No.2.

CORAM: A.M.KHANWILKAR,J

DATE : FEBRUARY 28, 2007.

P.C. :

1. Heard counsel for the parties. Admit.

2. Mrs.Joglekar waives notice for respondent No.1. Mr.Yadav waives notice for respondent No.2.

3. As short question is involved, appeal is taken up for final disposal forthwith by consent.

4. This appeal from order takes exception to the Judgment and Order passed by the City Civil Court, Greater Bombay dated 1st August, 2006 in Notice of

Motion No.2926 of 2006. By the impugned order the trial Court has rejected the Notice of Motion preferred by the appellant No.1 on the reasoning that the application is only by one of the plaintiff and there is no authority in favour of the plaintiff No.1 to pursue the application on behalf of the plaintiff Nos. 2 and 3. Accordingly, the application for restoration filed by the plaintiff No.1 came to be dismissed.

4A. The suit was dismissed for default inspite of the presence of the plaintiff No.1 in Court. It is seen from the record that the parties had exchanged the pleadings. The plaintiffs tendered affidavit of evidence in chief. The next stage was to proceed with the cross-examination of the plaintiffs' witness. The plaintiff No.1 had made himself available in the court on 24th July, 2006, but as his advocate was absent, the trial Court proceeded to dismiss the suit for default. This is the ground made out in the application for restoration. Ordinarily, the litigant should not suffer for the mistake of the advocate. On that principle, the trial Court ought to have shown indulgence to plaintiffs. However, the trial Court has proceeded to dismiss the application for restoration for the

reasons already indicated earlier. That view has been taken inspite of having noted that the suit relates to three different structures and each of the plaintiff was asserting right in respect of the structure in his occupation. Assuming that the plaintiff No.1 had no authority to file application for restoration on behalf of the plaintiff No.2 and 3, that would not preclude the plaintiff No.1 ton pursue his remedy of restoration of the suit as against him. This aspect has been glossed over by the trial Court.

5. Before this Court, although appeal is filed on behalf of all the three plaintiffs, it is stated in the appeal memo itself that the plaintiff No.1 is interested in pursuing the remedy and the other two plaintiffs are not taking keen interest. In the circumstances, as rightly contended by the counsel for the Corporation, the plaintiff No.1 cannot be permitted to espouse the cause of plaintiff Nos. 2 and 3, nevertheless, the suit will have to be restored in so far as the claim of plaintiff no.1 is concerned.

6. Accordingly, the impugned Judgment and Order is set aside. Notice of Motion is made absolute,

subject to restoring the suit to the file to its original number only as against plaintiff No.1.

7. It is made clear that plaintiff No.1 shall not seek any adjournment on future dates of hearing before the trial Court and extend full cooperation for early disposal of the suit.

8. Accordingly, appeal from order as well as civil application disposed of on the above terms with no order as to cost. All questions on merits are left open.